

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by

MILWAUKEE HEARING OFFICE
819 N 6th Street
Room 382
Milwaukee, WI 53203
Telephone (414) 227-4416
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JOHNNY'S PETROLEUM SERVICE

Re: PECFA Claim # 53150-9229-71

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above stated matter. Any party aggrieved by the proposed decision must file a written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. It is requested that you briefly state the reasons and authorities for each objection and argument to: Madison Hearing, Office, P.O. Box 7-975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Patrick J. Osborne, Department Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

STATE HEARING OFFICER:

DATED AND MAILED:

WILLIAM D. MCKEOWN

MARCH 30, 1995

MAILED TO:

Appellant Agent or Attorney

Department of Industry, Labor
and Human Relations

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On December 23, 1994, the Department of Industry, Labor and Human Relations issued an appealable order denying Johnny's Petroleum service reimbursement in the amount of \$9,608.55 under the PECFA program. Johnny's Petroleum Service filed a timely appeal from such denial on January 20, 1994. A hearing pursuant to that appeal was held on January 10, 1995 at Waukesha, Wisconsin, before Administrative Law Judge William D. McKeown, acting as a State Hearing officer.

Based on the applicable records and evidence in this Case, the state hearing officer makes the following

PROPOSED FINDINGS OF FACT

1. At all times material, Johnny's Petroleum Service (hereinafter the applicant) was the legal owner of the premise located at 876 W17871 Janesville Road, Muskego, Wisconsin where a petroleum distribution business was operated.
2. On or about April 14, 1993, the applicant filed a claim for reimbursement of expenses associated with site cleanup at the premises identified in paragraph 1 in the total amount of \$505,254.48. The Department of Industry, Labor and Human Relations (hereinafter the department) made reimbursement thereafter to the applicant in the amount of \$488,146.93.
3. The applicant appealed denial of the following elements of the initial claim:
 - a) \$3,826.38 for costs incurred prior to the date the department believed notification of the eligible discharge occurred, June 2, 1992.
 - b) \$3,106.45 for costs incurred for underground storage tank (hereinafter UST) removal.
 - c) \$1,403.24 for per diem costs in excess of \$75.00 per day for use of photoionization equipment;
 - d) \$232.88 for soil boring charges.
 - e) \$40.25 in mileage charges.
4. In contending that the notification of discharge should be set at May 7, 1992, the applicant relied on a telephone log purporting to show an entry on that date reflecting a conversation with a representative of the Department of Natural Resources. However, the individual having the conversation did not appear at the hearing to give testimony, nor was there a showing of the substance of the conversation, if any, which took place. The evidence overall submitted by the applicant in support of its notice of discharge prior to June 2, 1992 was insufficient upon which to base a finding of any earlier date.
5. Of the \$3,106.45 figure related to costs denied incident to removal of USTs, the applicant conceded that four of six components making up that figure were properly denied by the department. The applicant contended that \$2,105.00 for "field activities/UST closure", and \$276.00 for "drum pickup" were improperly denied as eligible costs under PECFA. Specifically, the applicant contended that clerical errors made by individuals preparing itemized invoices supporting claims for reimbursement under PECFA were erroneously annotated to show costs associated with UST removal following the last

date such costs qualified for reimbursement, November 1, 1991. Conversely, the applicant contended the work associated with the dollar amounts submitted was PECFA eligible, and that the appeal tribunal should disregard the inconsistency in the interests of justice. However, the appeal tribunal declines to do so. The claim herein was submitted by the applicant's environmental service company/agent. Based on the agent's clear obligation to screen and winnow eligible costs from ineligible costs, the agent's holding itself out as an expert in the environmental cleanup field, and the exclusive control that the agent had over collating and certifying to the accuracy, of the claim submission, any "clerical" errors reflecting ineligible costs were not excusable, given the size of the project, and amount of reimbursement claimed. The charges which the department denied were clear on their face as to what they purportedly related to, and the time frame during which the costs were incurred. A reasonable reading of the documentation supporting that portion of the claim would alert the experienced agent to a problem. No other compelling evidence was adduced to permit a finding that the two items of cost at issue actually related to a PECFA-eligible item, or that any other basis exists to overturn the department's denial.

6. The applicant submitted several invoices which claimed reimbursement for photoionization expenses on a per day basis of \$135 and a half-day basis of \$75.00. The department authorized reimbursement on a pro rata basis of \$75.00 per day. The applicant's agent presented testimony estimating the actual cost per day in the applicable economy at approximately \$25.00. The amount over that amount which represents overhead was adequate to compensate the applicant. The department was required by statute to deny costs which were determined to have been unreasonable. Its interpretation that the amounts for photoionization costs in excess of the \$75.00 guideline was excessive was an appropriate exercise of that authority.

7. In June, 1992, a subcontractor of the applicant's agent performed soil boring activities at the site, and submitted a claim for reimbursement. The sum of \$232.88, including subcontractor markup, was denied as reimbursement on the basis that the base soil boring cost of \$202.50 related either to analysis of a site where a new UST was to be placed, or was not otherwise specifically identified so as to constitute an eligible cost. Testimony at the hearing established that \$45.00 of the amount denied was denied improperly by the department due to misreading of the date in question; that amount is properly reimbursed to the applicant, together with a permitted markup of 15% of the charge, or a total of \$51.75. The balance was properly excluded due to the applicant's own identification of the soil boring cost as one incident to locating a new UST on the site. Such a cost is clearly excluded under the PECFA act and Wisconsin Administrative Code as being applicable to new product installation, and not remediation of a spill site.

8. After further review of the mileage costs submitted by the applicant which were denied as reimbursable items, the department determined that the amount claimed was improperly denied. The applicant is therefore entitled to the sum of \$40.25 as additional reimbursement, reflecting travel and mileage costs actually due the applicant under its claim.

PROPOSED CONCLUSIONS OF LAW

1. The applicant is the owner of a property covered by the remedial provisions of section 101.143 of the Wisconsin statutes.
2. The sum of \$3,826.38 for costs incurred prior to June 2, 1992, were properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143(4) of the Wisconsin Statutes, and chapter ILHR 47.30 (2)4 of the Wisconsin Administrative Code;

3. The sum of \$3,106.45 for costs incurred for, underground storage tank (UST) removal was properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143(4) of the Wisconsin Statutes, and Chapter ILHR 47.30(2)11 of the Wisconsin Administrative Code.
4. The sum of \$1,403.24 for per diem costs in excess of \$75.00 per day for use of photoionization equipment was properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143(4) and chapter ILHR 47.30(2)(h) of the Wisconsin Administrative Code.
5. The sum of \$202.50 was for soil boring charges, with its incident 15% markup, was properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143(4)(c)2 and 3 of the Wisconsin Statutes, and chapter ILHR 47.30(2)(d) of the Wisconsin Administrative Code. The sum of \$45.00, consisting of permitted remediation activity, together with its incident 15% markup, was improperly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143(4)(b) of the Wisconsin Statutes, and ILHR 47-30 of the Wisconsin Administrative Code.
6. The sum of \$40.25 in mileage charges was improperly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143 (4) (b) of the Wisconsin Statutes, and ILHR 47.30 of the Wisconsin Administrative Code.

PROPOSED DECISION

The department's decision denying reimbursement to the applicant is modified to conform to the above findings, and as so modified, is affirmed. Accordingly, the applicant is entitled to additional reimbursement in the amount of \$92.00, together with applicable loan interest charges. The balance of the reimbursement demanded by the applicant is denied.

WILLIAM D. MCKEOWN,
State Hearing Officer